No. 16385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Appellant,

vs.

FAYE LYONS,

Appellee.

APPELLANT'S OPENING BRIEF.

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A. Statement Concerning Pleadings, Facts and Jurisdiction.

1. The District Court Had Jurisdiction of the Case.

In each of the three causes of action of the amended complaint filed in the United States District Court for the Southern District, Central Division, the plaintiff alleged she was, at the time of filing said complaint, a citizen of the State of Florida, County of Dade, and that the defendant was a citizen of the State of California, County of Riverside; that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. [Par. I, Tr. p. 9.]

In each of the causes of action, plaintiff alleged that she suffered compensatory damages in the sum of $500,000.00 and exemplary and punitive damages in the

sum of $500,000.00, as a result of certain slanderous and libelous statements alleged to have been published by defendant concerning the plaintiff.

See Paragraphs IV and V of the first cause of action [Tr. pp. 11-12] and Paragraphs IV and V of the third cause of action. [Tr. pp. 15-16] By her prayer, plaintiff sought judgment accordingly. [Tr. p. 16.]

By the pre-trial conference order, after approval by counsel for both plaintiff and defendant, the trial court determined as follows:

> "The following facts are admitted and require no proof: A. Plaintiff was, at the time of filing the amended complaint herein, a citizen of the State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of $3,000.00, exclusive of interests and costs." [Tr. p. 40.]

Where there is a diversity of citizenship and the damages involved more than $3,000.00, the District Court had jurisdiction of the case.

28 *U. S. C. A.* 1332.

2. This Court Has Jurisdiction of This Appeal.

An appeal will lie to the United States Court of Appeals for the Ninth Circuit from an order made in said United States District Court, granting a motion for a new trial, where such an order exceeds the jurisdiction of the court in that it was made after 10 days from entry of judgment on a ground not specified in the motion for new trial.

28 *U. S. C. A.* 1291;

Jackson v. Wilson Trucking Corp., 243 F. 2d 212.

B. Statement of the Case.

This is an appeal from an order filed September 30, 1958, granting plaintiff's motion for a new trial filed on June 24, 1958, as to the second cause of action of the amended complaint.

I.
Summary of the Pleadings.

As to the First Cause of Action:

In this first cause of action, plaintiff alleged that the defendant on various occasions made and published false and malicious and slanderous statements concerning her, in substance and effect that: "Ray is shacking up with Faye Lyons" or "Ray shacked up with Faye Lyons" [See Tr. pp. 9-10.] In her answer, the defendant denied each and all of said allegations and alleged as an affirmative defense that each and all of said statements were true. [See Tr. pp. 21-22, Par. II; p. 22, Par. V.]

As to the Second Cause of Action:

In this second cause of action, plaintiff alleged: that the defendant, on November 26, 1955, verified and published of and concerning plaintiff the false and malicious words, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as 'Ray Gilliland and Family'." [See Tr. pp. 12-13, Par. II.]

The defendant in her answer admitted and alleged: that said statements were made in the allegations of her verified cross-complaint for divorce, filed in a divorce proceeding pending in the Superior Court of Riverside County, being action No. 62839 on the register of actions, entitled "George Chester Ray Gilliland, Plaintiff, vs. Elsinore Machris Gilliland, Defendant"; denied that said statements were false and malicious; and, as an affirmative defense, alleged that said statements were privileged under the provisions of §47, Subdiv. 2(3) of the Civil Code of the State of California, in the following facts alleged: (1) that the cross-complaint for divorce was verified by defendant; (2) that said allegations were made by defendant in good faith and without malice; (3) that, at the time said allegations were made, defendant had good and sufficient reason to believe that said allegations were true and had reasonable and probable cause for believing the truth of said allegations; and (4) that said allegations were material and relevant to the issues in said divorce action. *The defendant did not allege as an affirmative defense the truth of said allegations.* [See Tr. pp. 23-25, Par. II; pp. 26-27, Par. VI.]

By the pre-trial conference order, approved by counsel for both plaintiff and defendant, the trial court determined that the following facts were admitted and required no proof: (1) that the alleged libelous statements were made in the verified cross-complaint filed by defendant in said action No. 62839, in the Superior Court of Riverside County, California; and (2) that said di-

vorce action was pending between Ray Gilliland, as plaintiff, and Elsinore Machris Gilliland, as defendant, and that by her cross-complaint said defendant sought a divorce against plaintiff on the grounds of extreme mental cruelty and adultery, and that the allegations of said cross-complaint were material to the issues in said action. [Tr. pp. 40-41.]

As to the Third Cause of Action:

By the third cause of action, the plaintiff alleged that the defendant caused a newspaper article to be published in a newspaper of general circulation in Riverside, California, on March 23, 1956, reading as follows:

> "In her counter-complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix.
>
> "Named as co-respondents in the counter complaint were 'Ann (Peggy) Meyers' and 'Faye Lyons'." [Tr. pp. 14-15.]

C. The Findings of Facts, Conclusions of Law and Judgment.

After trial by the court, sitting without a jury, the Honorable William Mathes, Judge Presiding, signed and filed findings of fact as to the second cause of action, in substance, as follows:

It was true: (a) that the defendant, by her verified cross-complaint filed in said action No. 62839, in the

Superior Court of Riverside County, California, made the said allegations of and concerning the plaintiff. [See Tr. pp. 49-50 Par. V]; (b) that the said allegations of said cross-complaint were verified by defendant and were material and relevant to the issues in said action [Tr. p. 50, Par. VI]; (c) that said allegations were made in good faith and without malice; that at the time said allegations were made, defendant did have good and sufficient reason to believe, and honestly and reasonably believed, that said allegations were true, and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations. [Finding VII, Tr. pp. 50-51.]

It is not true: That the plaintiff was damaged by said publication [Finding VIII, Tr. p. 51.]

The court found that the issue of truth was not pleaded as a specific defense and was not set forth in the pretrial conference order as an issue, and declined to make a finding on "truth" of the said allegations of said cross-complaint in the divorce action, No. 62839 [Tr. p. 51.]

Conclusions of law and judgment were signed on June 16, 1958 and filed on June 17, 1958, in favor of the defendant and against the plaintiff. [Tr. pp. 52-53.]

D. The Motion for New Trial.

A motion for a new trial was filed by plaintiff on June 24, 1958. Said motion did not specify, as a ground, that the trial court erroneously received evidence of the conduct of plaintiff with Ray Gilliland, on the issue of

truth as a justification or in mitigation of damages when truth was not specifically pleaded by the defendant as a defense. The sole grounds specified in said motion for a new trial as to the second cause of action were:

(I) irregularity in the pre-trial proceedings by the elimination of the issue of "truth" as to the slanders and libels from the case, when "falsity" had been pleaded by plaintiff and denied by the defendant;

(II) insufficiency of the evidence to support the following findings of fact, in substance:

(D) Finding VII: (Said allegations of said cross-complaint in said action No. 62839 were made in good faith and without malice, and with probable cause for believing said allegations to be true [Tr. p. 55];

(E) Finding VIII: That plaintiff was not damaged by said publication of said cross-complaint in said action No. 62839 in the sums alleged or in any other sum [Tr. p. 55]; and

(F) Finding IX: That the trial court refused to find on the issue of truth. [Tr. p. 55.]

On August 6, 1958, plaintiff filed a reply memorandum [on motion for new trial], in which it is stated:

"Evidence for the purpose of proving truth is not even admissible in evidence. *Davis v. Hearst,* 160 Cal. 143, at 194, lines 11 to 16." [Tr. p. 73.]

E. The Decision on Motion for New Trial.

On September 29, 1958, the trial court granted plaintiff's motion for a new trial as to her second cause of action on the ground that the trial court erroneously received and considered evidence of misconduct of plaintiff with Ray Gilliland on the issue of truth, when truth as justification, or in mitigation, was not specifically pleaded by defendant as a defense to the second cause of action. This order was filed September 30, 1958.

The order granting said motion for new trial as to the second cause of action, reads as follows:

> "It is Ordered that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only . . . [See: Cal. Civ. Code, §47-2(3); *Davis v. Hearst,* 160 Cal. 143, 195, 116 Pac. 530, 552, (1911); *Tingley v. Times-Mirror Co.,* 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]"

A photo copy of page 195 of *Davis v. Hearst,* reported at 60 Cal. 143, is as attached.

A photo copy of page 26 of *Tingley v. Times-Mirror Co.,* reported at 151 Cal. 1, is as attached.

Each of these reported cases holds at the page cited that, in a libel action, evidence as to truth as justification or in mitigation, is not admissible unless truth, as justification or in mitigation, is specifically pleaded as a defense. This is the *exclusive* subject-matter of the pages cited.

As it was neither alleged directly nor in effect that the charge relative to plaintiff's treatment of Mrs. Neirsheimer was true, the plea was insufficient as a justification, and must be treated, as the answer declared it was interposed, as a plea in mitigation.

But as a plea in mitigation it is radically insufficient. In order to have constituted a good plea in mitigation it was necessary for the plaintiff to have alleged and proven that it had knowledge of the facts set up in mitigation prior to the publication of the article from reliable sources, or had ascertained them after due investigation and believed them to be true. (*Wilson* v. *Fitch*, 41 Cal. 363; *Barkly* v. *Copeland*, 74 Cal. 3, [5 Am. St. Rep. 413, 15 Pac. 307]; *Edwards* v. *San Jose P. and P. Society*, 99 Cal. 437, [37 Am. St. Rep. 70, 34 Pac. 128].)

Now, the only allegation in this plea is that which we have quoted above,—namely, that Mrs. Neirsheimer and others had communicated the facts alleged in the subdivision of the answer in question to various persons in the city of San Diego, and that they were matters of public notoriety in that city. This did not constitute a good plea in mitigation. It is simply an allegation that there were rumors of the matters set up in the plea. But an allegation of rumors, or proof of them, would not constitute or support a plea in mitigation. (*Wilson* v. *Fitch*, 41 Cal. 363; *Edwards* v. *San Jose P. and P. Society*, 99 Cal. 437, [37 Am. St. Rep. 70, 34 Pac. 128].) It is not alleged that defendant had any knowledge on any rumored matters, or that it ever investigated them, or if so that it believed them to be true and in good faith made the publication of them. In fact, it is not even alleged by the defendant that at the time of the publication it had ever heard of the rumors. Under the authorities, in the absence of such allegations, no sufficient plea in mitigation is stated. As there was no plea in justification, and no sufficient plea in mitigation, the court properly excluded the evidence bearing on the facts set up in this subdivision of the answer.

9. No error was committed in the rulings of the court as to evidence of the general reputation of plaintiff. This was offered to be proven by the depositions of three witnesses taken on behalf of defendant—two in New York and one in Boston. The testimony of the New York witnesses was prop-

Pac. 1097].) Evidence was rejected which was offered to show that in other respects than in those specified in the articles, the recommendation of the plumbing inspector and health officer had been disregarded by the board of education. This evidence was offered in mitigation as tending to prove the truth of the charge of loose methods, etc. Therefore, it could and should have been pleaded in mitigation with an allegation of the knowledge of the defendants of the fact at the time of the publication. For there is this broad distinction between a plea in justification and evidence of the truth given in mitigation: the truth whenever discovered is a complete defense to the defendant. But to repel the conception of malice in the publication, only so much of the truth as the defendant knew at the time of the publication can avail him. The same ruling of the court was proper in reference to evidence directed to specific acts of favoritism which had not been pleaded in justification. The offered evidence to show that the manner of filing demands from the school board and the delivery of the warrants in favor of the claimants had been changed since the publication, could not, of course, be evidence tending to repel the existence of malice at the time of the publication. And if the charge against plaintiff in this regard was libelous, the evidence could only be considered as tending to show the truth of the charge and was properly rejected as not having been pleaded in mitigation. Evidence to substantiate the charge that plaintiff as a member of the school board, gave out false information, could have been shown under a plea in mitigation specifically naming the persons to whom such false information was given. (Odgers on Libel & Slander, p. 591.) But in the absence of such a plea in mitigation, the evidence was properly excluded.

There was given to the jury, as an instruction, an argumentative discussion by this court in *Dauphiny* v. *Buhne*, 153 Cal. 757, [126 Am. St. Rep. 136, 96 Pac. 880], where there was under consideration the question of qualified privilege as a defense to libel—a question not in this case at all. In the Dauphiny case it is pointed out that "it is always injudicious to take the language of a court, in discussing a proposition of law, as correct instruction to be given to a jury." This is necessarily so, for it is always proper and frequently imperative upon a court of review, in answering arguments *pro* and

I.

The District Court Had No Jurisdiction Under Rule 59(d) of the Rules of Civil Procedure to Grant the Motion for New Trial on the Ground States, Namely: That Evidence of Truth of Libelous Matter Was Received, When Truth Was Not Pleaded as an Affirmative Defense.

Rule 59 of the Federal Rules of Civil Procedure sets forth the procedure authorizing the granting of new trials. In general, upon the timely filing of a motion for new trial in an action tried without a jury, the Court may grant a new trial for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

> 28 *U. S. C. A., Rule* 59, *Fed. Rules of Civil Procedure.*

It is further provided that, not later than ten days after entry of judgment, the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the ground therefor.

> 28 *U. S. C. A., Rule* 59(d), *Fed. Rules of Civil Procedure.*

It has been repeatedly held that, upon the lapse of ten days after entry of judgment, the Court is without power to grant a new trial upon any ground not stated in the timely-filed motion therefor, and that any order granting a new trial upon a nonspecified ground, made after said ten-day period, is void and beyond the jurisdiction of the court.

> *Jackson v. Wilson Trucking Corp.,* 243 F. 2d 212 (1957, Dist. of Col.);

National Farmers Union Auto & Cas. Co. v. Wood, 207 F. 2d 659 (1953, 10th Cir.);

Freid v. McGrath, 133 F. 2d 350 (1942, Dist. of Col.), *cf. Citizens Nat. Bank of Lubbock v. Speer,* 220 F. 2d 889 (1955).

In the case at bar, the judgment was entered on June 17, 1958 and plaintiff's motion for a new trial was filed on June 24, 1958. However, the court's order granting a new trial only as to the second cause of action was not made until September 28, 1958. Hence, the time within which the court had the power to act under its own initiative had long since expired and the court, in granting a new trial, was limited to the grounds stated in plaintiff's motion.

The order granting a new trial specified:

"[See: Cal. Civ. Code, §47-2(3); *Davis v. Hearst,* 160 Cal. 143, 195, 116 Pac. 530, 552 (1911); *Tingley v. Times-Mirror Co.,* 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]"

By reference to the statute and reported cases, the court clearly indicated its grounds for the order.

The citation of Civil Code §47-2(3) is of course, the statutory counterpart to the common law plea of mitigation referred to in *Davis v. Hearst, supra,* and *Tingley v. Times-Mirror Co., supra,* at the pages cited by the court. In the case *Davis v. Hearst, supra,* the court, at the page cited, was concerned solely with the exclusion of evidence tending to show the truth of libelous matter, where truth as justification or in mitigation of damages was not pleaded by the defendant. This was also the sole matter under discussion in *Tingley v. Times-Mirror Co.,*

supra, at the page cited by the court. Both cited cases held, on this point, that the evidence offered was properly excluded by the trial court since neither a plea of truth as justification, nor in mitigation of damages, was before the court there. From an examination of the order granting a new trial and the specific citation in said order, it is certain that the trial court's ruling here was based solely upon the ground that evidence had been improperly received, which evidence tended to prove the truth of the alleged libel, when the defense of truth had not been pleaded as to the second cause of action. At this point, it is not necessary to inquire as to whether such evidence was, in fact, erroneously received by the trial court. This ground for granting a new trial would be available only if it were a ground specified in plaintiff's motion for new trial.

Plaintiff's motion for new trial specified, with relation to the second cause of action, only two grounds in support thereof. [A third ground (failure to offer a deposition) was designated, which required affidavits in support thereof. No affidavits were filed and hence, this ground may be disregarded.] The two grounds were as follows:

> "I. Irregularity in the Pre-Trial Proceedings by the elimination of the issue of 'truth' as to the slanders and libels from the case when 'falsity' had been pleaded by plaintiff and denied by the defendant;
>
> * * * * * * * *
>
> "III. Insufficiency of the evidence to justify the decision. The following specifications are urged:
>
> * * * * * * * *

D. Finding VII is opposed to the weight of substantial and probative evidence in that there is no evidence save the self-serving and self-contradicted statements of defendant herself to support the finding that she acted 'in good faith' and 'without malice' and that she honestly and reasonably believed that the allegations were true at the time they were made. The last three lines of said Finding are a conclusion of law.

E. Finding VIII is opposed to and is not supported by a fair preponderance of substantial and probative evidence.

F. Finding IX is erroneous as constituting a spurious excuse for omitting a necessary finding essential in the establishment of substantial justice in this case."

Nowhere in said motion is there any reference to error in the receipt of evidence at the trial of this action. In fact, the *only* reference to such matter—until the order granting the new trial was made—is found in an obscure reference in plaintiff's reply memorandum [filed August 6, 1958], wherein she states:

"Evidence for the purpose of proving truth is not even admissible in evidence. *Davis v. Hearst,* 160 Cal. 143, at 194."

Appellant submits that the court granted said motion for new trial on a ground not stated in plaintiff's motion; that, since the ten-day period within which the court could act on its own initiative had expired, the court was without power to grant a new trial on the ground stated in its order. Therefore, the order should be reversed and the judgment for defendant reinstated.

II.

Assuming—Without Conceding—That the District Court Had Jurisdiction to Grant a New Trial on the Ground Stated —a Ground Not Mentioned in the Motion for New Trial— the Granting of the Motion on the Ground Stated Was a Gross and Prejudicial Abuse of Discretion.

Although we freely concede that the trial court possesses a wide discretion in granting or denying a motion for a new trial, we believe that to grant a new trial on the stated ground of erroneous receipt of evidence introduced by plaintiff, herself, would be a plain and direct abuse of discretion reviewable on appeal.

It has been held that, although the trial court possesses a discretion in granting or denying a motion for a new trial, such discretion must be exercised wisely and, *if it clearly appears that such discretion has been exercised unwisely and has been plainly abused, it is reviewable on appeal.*

> *United States v. 2969.59 Acres of Land,* 56 Fed. Supp. 831 (D. C. Idaho, 1944).

It is too well established to require detailed citation that a new trial should not be granted except for that which did prejudice to the moving party.

> *Union Elec. Light & Power Co. v. Snyder Estate Co.,* 15 Fed. Supp. 370 (D. C. Mo., 1936).

The ground stated for the granting of the new trial here, that evidence of truth of the alleged libelous matter was received when truth was not pleaded as an affirmative defense to the second cause of action, could not possibly prejudice the plaintiff for the following reasons:

A. The Plaintiff, Herself, Tendered and Presented Evidence on the Issue of Truth.

1. Plaintiff elicited evidence from the defendant, the only probative value of which related to the truth of the alleged libel. Plaintiff's first witness, called as an adverse witness, was defendant Elsinore C. Machris Gilliland [Tr. p. 85], whose testimony upon this direct examination is found on pages 85-118 of the transcript. Toward the close of her direct testimony, the following occurred:

> "Q. (By Mr. Hughes): Mrs. Gilliland, did you ever have an act of sexual intercourse with Ray C. Gilliland?
>
> Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.
>
> Mr. Hughes: I will reframe the question, your Honor.
>
> Q. Isn't it true, Mrs. Gilliland, you were married May 3, 1954, and that you had an interlocutory decree of divorce granted you June 13, 1956, and in the intervening time you never had an act of sexual intercourse with Ray C. Gilliland?
>
> Mr. Murphy: I object to that as being incompetent, irrelevant and immaterial, outside of any issue in this case.
>
> The Court: Of course, if there had been evidence here it might be very good on rebuttal, if there was evidence claiming this was true. But all that is before the court now is the allegation of the cross-complaint. Is that correct?
>
> Mr. Hughes: Yes, your Honor.
>
> The Court: As far as any claim of libel is concerned. Now, if you rested on that and the defense

offered to prove that it was true, then in rebuttal it might be competent for you to show that he was incapable of it. And that is the purpose of the question, isn't it?

Mr. Hughes: Yes, sir.

The Court: I will sustain the objection at this time." [Tr. pp. 117-118.]

Prior to resting his case on direct, plaintiff's attorney again pursued the same questions, and the following occurred:

"Q. Did you ever have sexual intercourse with Ray C. Gilliland during the period of May 3, 1954 through June 13, 1956?

Mr. Murphey: Just a moment. That is objected to as being incompetent, irrelevant and immaterial; no proper foundation laid.

Mr. Hughes: If your Honor please—

The Court: There again it is probably more proper on rebuttal, a matter of order of proof, and the objection will be overruled.

Q. (By Mr. Hughes): Would you answer, please, Mrs. Gilliland? A. No.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any questions?

Mr. Murphey: No questions of this witness at this time.

The Court: You may step down, Mrs. Gilliland.

(Witness excused.)" [Tr. p. 176.]

As stated by the trial court, the only materiality of this evidence related to the truth of the alleged libel.

2. Plaintiff's counsel took the position in open court that truth of the libelous statements was in issue. Prior to plaintiff's direct examination, the following occurred:

> "Mr. Hughes: If your Honor please, the plaintiff here, subject to orderly process, can testify as to when she first heard of these things, what she did, if anything, about them, and her relationship, if any, with Ray C. Gilliland; that the gravamen of this action is the truth of these statements—
>
> The Court: Is this offered on the second cause of action?
>
> Mr. Hughes: This is offered, your Honor, not only on the first cause of action *but also on the second cause of action.*" [Tr. pp. 119-120.]

Thus, plaintiff's counsel put in issue the truth of the statements set forth in the second cause of action.

3. Plaintiff elicited evidence relating to truth of the alleged libel from the plaintiff Faye Lyons, his second witness. Plaintiff in great detail testified regarding her relationship with Mr. Gilliland, including the following aspects thereof:

> (a) Her visit to his ranch in Oregon in 1937 and return to Reno. [Tr. p. 120.]
>
> (b) Her meeting with him in Miami, Florida, in 1954 and 1955. [Tr. p. 121.]
>
> (c) Her trip to Scottsdale, Arizona, in the Spring of 1955; and, in detail, regarding her visits with Mr. Gilliland and her relationship with him during her week's visit to Scottsdale. [Tr. pp. 121-123.]
>
> (d) Her automobile trip with Mr. Gilliland between May 2 and May 9 or 10, 1955, from Scottsdale to Miami, including their visits at Knox City,

Texas, and Fort Worth, Texas, en route, including separate accommodations at Fort Worth, and from Fort Worth to Miami. [Tr. pp. 123-126.]

(e) Her second trip to Scottsdale about June 3, 1955, her accommodations at Paradise Valley Guest Ranch, Scottsdale, who occupied the bedrooms, the purpose of this second trip, her visits with Ray Gilliland, her side trip to Los Angeles, California, her denial that she stayed overnight in Mr. Gilliland's home in Scottsdale, the presence of Mrs. Lampert (Mr. Gilliland's housekeeper), their household routine, the bringing of her friend, Beatrice Nemer Schor, to Scottsdale from Los Angeles. [Tr. pp. 126-132.]

And finally, after testifying regarding damages [Tr. pp. 132-138] plaintiff closed her direct examination as follows:

"Q. And during that period, August 29, 1955 through October 23, 1955, you were always in Miami, Florida? A. Yes.

Q. Did you ever have sexual intercourse with Ray Gilliland? A. No.

Mr. Hughes: I have no further questions.

The Court: That concludes your examination?

Mr. Hughes: Yes, your Honor." [Tr. p. 138.]

4. Plaintiff's attorney also elicited from his third witness, Blanche Lampert, testimony relative to the truth of the alleged libel. Her testimony is found on pages 139-148 of the transcript. She was questioned at length about the number of visitors at the Ray Gilliland house, where Mr. Gilliland slept. [Tr. pp. 139-142.] Then the follow-

ing questioning by plaintiff's attorney, Mr. Hughes, took place:

> "Q. Did you see anything in the house that would lead you to believe that Faye Lyons committed adultery with Ray Gilliland?
>
> Mr. Murphey: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial.
>
> The Court: Sustained.
>
> Q. (By Mr. Hughes): Well, what did you observe between the conduct of Ray Gilliland and Faye Lyons, if anything? A. Well, she was down there, and they partied together. I mean they had drinks together. And they argued a little bit.
>
> Q. In fact, all four of you, your husband and yourself and Ray and Faye Lyons sat in the kitchen and ate dinner, and such, didn't you? A. We have, yes." [Tr. p. 142.]

The foregoing testimony was in addition to that testimony elicited from the witness Blanche Lampert with regard to the information concerning this relationship which she related to the defendant and defendant's attorney, Mr. Murphey, in a sworn statement, Plaintiff's Exhibit 5 herein. [Tr. pp. 147-148.] A summary of Exhibit 5, concerning the conduct of Faye Lyons is as follows:

> "In May, 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked a steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock

in the morning at Ray Gilliland's house. They would sit there and drink together. Later Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland' house every day and I baby-sat with the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge; I think he bought it from Ed Spears."

5. Plaintiff's fifth witness [the fourth witness, Frank Kerwin, only testified regarding the first cause of action, not involved here], Beatrice Nemer Schor, testified on direct examination regarding plaintiff's trip to Scottsdale after plaintiff's visit to Los Angeles, also plaintiff's lack of association at Los Angeles and Scottsdale with Ray Gilliland. [Tr. pp. 149-153.] The only possible relevancy of such testimony would be in relation to the truth or falsity of the alleged libelous allegations.

We submit that all the foregoing testimony was specifically offered by plaintiff on the issue of the truth of the alleged libel—it could have no possible relevancy to any other issue.

B. On Cross-Examinatin of Plaintiff's Witnesses, Including Plaintiff Herself, Defendant Offered Evidence on the Issue of Truth Without Any Objection by Plaintiff.

1. None of the evidence relating to the issue of truth of the allegations in the alleged libel brought out by defendant on cross-examination of plaintiff's witnesses was objected to by plaintiff.

It is well established that complaint cannot be made on appeal of the introduction of evidence which was introduced without objection.

Smails v. O'Malley (1942), 127 F. 2d 410, C. C. A. Neb.;

Collins v. Streitz (1938), 92 F. 2d 430 [Certiorari denied, 59 S. Ct. 67, 305 U. S. 608, 83 L. Ed. 387].

Assuming, without conceding, that the evidence of truth was immaterial on the second cause of action, it is well established that the right of cross-examination is not confined to the specific questions asked or detail elicited on direct examination, but extends to the *subject-matter* about which inquiry was made.

Butler v. N. Y. Central Ry. Co. (1958), 253 F. 2d 281, C. A. Ind.

2. The only testimony regarding the truth of the alleged libelous matter which was elicited by defendant was on cross-examination, of plaintiff's witnesses *without objection,* a *summary* of which follows:

Cross-Examination of Plaintiff, Faye Lyons:

I was born November 29, 1913, at New York City. My father's name was Isidore W. Lyons.

My mother's name was Elsa Spielholz. I have one sister, Lois Springer. I have had an elementary and high school education. I moved to Florida in 1951. I had been in show business when I was a child, until I was 17 or 18. [Tr. p. 177.]

In response to a question whether she was a chorus girl in a George M. Cohan production, the witness testified:

"Yes, I was 12 or 13 years old, and I had the privilege of being in a George M. Cohan production in which I understudied and did appear in two or three very lovely production numbers. I was not a chorus girl as I think of the term." I also was in one George White show when I was 16. I posed for James Montgomery Flagg as a child for a cover of Cosmopolitan magazine. I have been married twice. The first was to Arthur Cohen in 1932. I was divorced from him at Reno, Nevada, in 1937. I married Emanuel M. Pomerantz in 1944 in New Jersey. I had one son by him, born March 30, 1949. [Tr. p. 178.] I was divorced from Mr. Pomerantz April 9, 1952 at Miami, Florida. [Tr. p. 179.]

I knew Ray Gilliland. I first met him in 1937 at Reno, Nevada. I took a trip with Mr. Gilliland to Oregon with five or six other people. I returned the next day. I don't remember whose car was used on the trip. [Tr. p. 179.]

Some time after I went to New York I saw Mr. Gilliland. He visited at my home several times. I ran into him at a restaurant in New York unexpectedly, at Luchow's. [Tr. p. 179.]

I saw Mr. Gilliland at Miami Beach in 1954. I was working at L'Aiglon. Among other duties, I

had a hat and cigarette concession. I sold cigarettes personally sometimes. My hours at L'Aiglon were approximately 7:30 P.M. to midnight, and at times 2:00 A.M. I worked there until approximately April 1956. [Tr. p. 180.]

After this, I had a cigarette and hat concession at the Felix Young restaurant. I greeted patrons and in exchange I had these concessions. [Tr. pp. 181-182.]

Once in Miami in 1954, after work one night I went out with Mr. Gilliland to the Patio restaurant. I met Ann Meyers there. Mr. Gilliland introduced me to her. It was about 11:00 or 12:00 o'clock. [Tr. p. 183.]

From this party I drove Mr. Gilliland's rented car home after about a half hour. The next day I dropped Mr. Gilliland's car off at Mrs. Meyers' home. This was in January 1954. [Tr. p. 184.]

In 1955, I saw Mr. Gilliland at Miami Beach two, or possibly three or four times. I remember his being at the house for dinner on two occasions and at L'Aiglon on one or two occasions. [Tr. p. 184.]

I knew that Mr. Gilliland married Elsinore Machris on or about May 3, 1954. I saw it in the papers, their big wedding party. I knew that commencing about January 1955 they were having marital difficulties. I knew this when I saw Mr. Gilliland at Miami Beach in 1955, when he was there a few days. [Tr. p. 185.]

The next time I saw Mr. Gilliland was at Scottsdale or Phoenix, Arizona, in April 1955, around the 23rd or 24th of April. I flew out alone. Mr. Gilliland met me at the airport and took me to the

Paradise Valley Guest Ranch. I don't think I registered. Mr. Gilliland drove me from the airport, introduced me, stayed a few minutes, and left. I received a phone call from Mr. Gilliland inviting me to come out there. "I spoke to him on the phone to tell him when I was coming." [Tr. pp. 185-186.] I testified that I went out there for the purpose of possible business locations, either a hotel or motel or restaurant. I planned to stay a little while and then return to Miami and take a course in restaurant and hotel management, or cashiering. [Tr. p. 187.]

The Paradise Valley Guest Ranch is approximately three or four blocks from Mr. Gilliland's house. I don't remember any correspondence with Mr. Gilliland about coming out. I stayed at Paradise Valley Guest Ranch six, seven or eight days. While there I met Blanche Lampert. The day after I met Blanche Lampert, I left. [Tr. p. 187.] It seems I had seen her more than once, possibly twice, before I left on May 2nd. I also met Ray Lampert. He did the yard work at Ray Gilliland's home. Blanche came in late, about 4:30 or 5:00 o'clock, to cook their dinner. The house has a room separated from the main house by a carport and Mr. and Mrs. Lampert occupied this bedroom. [Tr. p. 188.]

I went down to Mr. Gilliland's home in the evening a few times. I may have had an occasional one or two highballs. [Tr. p. 189.]

I don't think I ever was at Mr. Gilliland's home when there were no other people present. The first day I was there with other house guests. Early in the evening I was watching a car up the road, something very odd about this. The car was parked there

for about an hour or more with the little parking lights on and I wondered what it was doing there. We noticed the car start and come very slowly by the house, from three or four hundred feet, and it circled the house and went back to the starting point. Somebody said ". . . it must be detectives" or "someone watching the house." This happened so many times after that I realized I might be subjecting myself or exposing myself and decided I had better not ever be alone with Mr. Gilliland in view of this. We were aware that we were being followed or shadowed. Judge Blake and Mrs. Blake were there and some other people, whose names I don't remember. [Tr. pp. 189-190.]

"I had the feeling that I had come into a hornet's nest or in the midst of something that I would be better off not ever being with Mr. Gilliland. I was wary, concerned." [Tr. p. 191.]

Four or five days after I arrived I received a telephone call from my mother concerning my father. I drove with Mr. Gilliland from Scottsdale, Arizona, to Knox City, Texas. I don't remember whether Clyde Williams was with us or not. I may have driven alone with Mr. Gilliland. We left early in the morning, about 6:00 or 7:00 o'clock. I don't remember whether we drove straight through to Knox City, or stopped overnight. [Tr. pp. 191-192.]

On arrival at Knox City, we first went to Judge Williams' house and had lunch there. After a couple of hours we drove to Fort Worth, stopping on the way to look at oil property. [Tr. p. 192.] Mr. Clyde Williams was with us. When we got to Fort Worth we stayed at the Hilton Hotel. I did not register.

I don't remember who registered. We had adjoining or consecutive rooms. I don't know whether there were doors between. I would not say there were not. Clyde Williams' room was next to mine. Many of these older hotels have doors between the rooms which can be locked or left open at will, if so desired. There were probably doors between. [Tr. p. 193.]

At a club we met some friends of Clyde's. Clyde introduced Mr. Gilliland and me. According to my recollection, Mr. Gilliland did not introduce me as "Mrs. Gilliland." I wouldn't say that he did not do so. [Tr. p. 194.]

We all stayed at the Hilton Hotel that night. I occupied the bedroom next to Mr. Gilliland's. [Tr. p. 194.]

Mr. Gilliland offered to give me some money to do a little shopping, to get myself a little present. I refused. The next day, Mr. Gilliland and I left in his car for Miami, Florida. I couldn't get an airplane reservation. I had to get home quickly because my father had a stroke. [Tr. pp. 195-196.]

I don't remember the first city we stopped at or the hotel at which I registered or stayed. I have no knowledge of any of the cities we stopped at between Fort Worth and Miami Beach except New Orleans, Tampa, and Montgomery, Alabama. I do not remember the names of any of the hotels where we stayed. At these hotels or motels, Mr. Gilliland and I had adjoining rooms, depending on the available rooms at the time. Sometimes they were next to each other and sometimes they weren't.

"Q. Well, is it of any importance to you whether they were adjoining or not? A. Absolutely none." [Tr. pp. 197-198.]

Sometimes Mr. Gilliland registered, sometimes I did. Mr. Gilliland paid all of the lodging bills. He paid for my meals on this trip. [Tr. p. 198.]

At Miami, Mr. Gilliland stayed at North Beach. He left the next, or the following day. Before he left he phoned me saying, in substance, he was leaving for Scottsdale and would like to see me before he left. He stopped at my home to say goodby. [Tr. pp. 198-199.]

While Mr. Gilliland was at Miami, my little boy and I went over to his hotel and went swimming for an hour or two, then left. Before leaving, I invited him to dinner. I don't recall seeing him any other time at Miami on this occasion. I stayed at Miami about a week or ten days and then flew to Phoenix with my son. Mr. Gilliland met me at the airport. He took me out to Paradise Valley Guest Ranch. I don't remember registering. I occupied the same apartment, No. 1, the same apartment I occupied when I was there before. [Tr. p. 199.] I stayed about four or five weeks, including the time for my trip to Los Angeles, which was five days. I think I arrived the 3rd or 4th of June and left on July 7th. [Tr. p. 200.]

When I arrived at Scottsdale upon my return from Miami Beach, Ray Gilliland and Clyde Williams drove out to Paradise Valley Guest Ranch. They were driving a brand new Dodge sedan. Mr. Gilliland did not hand me the keys and say, "Here, this is for you." He said, "It's all yours to use while you are here." He also said, "It's very hard to be in this country without a car." He did not say, "This is your car." [Tr. p. 201.]

Mr. Gilliland gave me some money for a dog for my boy. I don't remember the date. I went down to look at the dog but told my boy that it was more practical to wait until we returned to Miami. Mr. Gilliland gave me $200.00. When he gave it to me he said he won it and to buy something for Dan. I took the money. [Tr. p. 202.]

When I returned from Miami to Scottsdale, I saw Mr. Gilliland on many occasions, several times. I would estimate eight or ten times. He took me to dinner. I don't remember him taking me to lunch. He took me and my son on a trip to Prescott one day, leaving about 10:00 in the morning and returning about 5:00. [Tr. pp. 202-203.]

I never went to Mr. Gilliland's house in the late afternoon and stayed until 2:00 or 3:00 o'clock in the morning. [Tr. p. 203.] I don't remember that I ever had highballs with Mr. Gilliland alone in his home. Mr. Gilliland did not stay at the Paradise Valley Guest Lodge at any time while I was there. I did not have an argument or disagreement with him, at which time he took the automobile away from me and I never threw a glass at him. He never did slap me. I never slapped him. [Tr. p. 204.]

I went to Phoenix with the idea of buying a business. When I left for Scottsdale, I had $700.00 or thereabouts. I flew out. Mr. Gilliland wired me the money for plane fare from Miami to Scottsdale. He wired the money unbeknownst to me. I accepted it." [Tr. pp. 204-205.]

The deposition of Faye Lyons was offered for identification and marked Defendant's Exhibit B for identification. [Tr. p. 206.]

All of the foregoing testimony, the only relevancy of which related to truth of the alleged libel, was elicited on cross-examination *without any objection on the part of plaintiff*. In fact, the only object in the entire cross-examination was as follows:

> "Q. Did you ever have highballs with Mr. Gilliland alone in his home? A. I don't remember.
>
> "Q. Would you say that you did not have highballs with him in his home alone?
>
> Mr. Hughes: Your Honor, I object to that line of questioning. The question has been asked and answered.
>
> The Court: Sustained."

Testimony of Clyde Williams:

In addition to the foregoing testimony relative to truth of the allegations of adultery between plaintiff and Ray Gilliland, elicited on cross-examination without objection, plaintiff stipulated in writing that Clyde E. Williams be deemed to have been called and to have testified in accord with Defendant's Exhibit C. [Tr. p. 210.]

A summary of the testimony of Clyde Williams is as follows:

> Faye Lyons and Ray Gilliland arrived at Knox City in May 1955. They spent two or three hours at his home and that of his father, Judge Williams. In the afternoon he, Faye Lyons and Ray Gilliland drove to Fort Worth and registered at the Hilton Hotel. Faye Lyons and Ray Gilliland had adoining rooms with an interconnecting door, and Clyde Williams had a room several doors down the hall. All three spent the first evening at the Fort Worth Club; that he met some of his friends, introduced Ray

Gilliland who, in turn, introduced Faye Lyons as "Mrs. Gilliland." The next morning Ray Gilliland gave Faye Lyons some money to shop with. That night they had dinner at the Hilton Hotel after which Ray Gilliland and Faye Lyons retired to their rooms. I drove Ray Gilliland's car from Miami Beach to Scottsdale where I spent four or five days. Faye Lyons spent most of her time at Ray Gilliland's house at Scottsdale. She hired a baby-sitter for her son. They did considerable drinking and night-clubing. They often laughed at what Mrs. Gilliland would do if she knew what was going on. Ray Gilliland bought a new Dodge sedan, drove it with me to Paradise Valley Guest Ranch. Ray Gilliland gave Faye Lyons the keys, saying in substance: "It is all yours."

Cross-Examination of Plaintiff's Witness, Blanche Lampert:

On cross-examination of plaintiff's witness, Blanche Lampert [Tr. pp. 211-222], defendant's attorney elicited information regarding the argument plaintiff had with Ray Gilliland, as follows:

"Q. Now, on the occasion that you have mentioned in your statement about Mr. Gilliland and Faye Lyons getting into an argument—did you hear that argument? A. I remember about that, yes. It was the last night—

Mr. Hughes: I would like to know, your Honor, the date, time, place, and who was present—the foundation.

Mr. Anson: This is cross-examination, your Honor.

The Court: Let's have it so we will know. We can follow the testimony better, anyhow.

The Witness: Mr. Gilliland—

The Court: Just a moment. Let's find out where it was and who was there.

Q. (By Mr. Murphey): Do you remember when it was? A. It was the last day or the next to the last day that Faye was out at Scottsdale before she left. And she didn't go to Vegas. She went home. Mr. Gilliland asked me—they had been having trouble and Faye said she could not have anything more to do with him, that he was drinking too much. So Mr. Gilliland asked me if I would go up and babysit so he and Faye could talk things over.

So I went up and babysat with the little boy. And pretty soon, not too late, because she wasn't gone very long, Faye came home.

Q. Where was this? A. At the Paradise Guest Ranch. And Mr. Gilliland brought her home. And I said to her, 'Where is the Dodge?'

She said, 'He took it away from me. We had a fight.' She said, 'He slapped me and I threw a glass at him.'

I went back down to Mr. Gilliland's home and he told me the same thing. I swept up the glass.

But before I went I said to Faye, 'Are you still going to Vegas?'

'No,' she says, 'I am going back home to Miami.'

Q. All right. Now, on another occasion was there an argument? Did an argument develop while there were guests at the house?

A. Yes. The night that Judge and Mrs. Blake, Phil Kent and his wife and Faye and Mr. Gilliland—

we had a steak dinner there at Mr. Gilliland's home. Mr. Blake and I cooked the dinner, and Mr. Gilliland got pretty—well, he drank quite a bit and got very obnoxious. So Faye said to him, 'Take me home.'

So he took her up to the Paradise Valley Guest Ranch and he didn't come back. And the next morning I took my husband to work when he was a gardener there, and Mr. Gilliland, about a quarter to 8:00, came out of her apartment, and his car was still sitting in front of her apartment. And Lee was there—, that is, Mrs. Silverman—and she really gave Ray the dickens for staying up there." [Tr. pp. 216-218.]

Also, *without any objection,* the following testimony bearing on truth of the alleged libel was elicited on cross-examination of plaintiff's witness, Blanche Lampert:

"Q. Did you ever observe Mr. Gilliland kissing Faye Lyons? A. Once or twice.

Q. When? A. In the kitchen out by the bar when we were all sitting out there.

Q. Where was this? What house? A. At Mr. Gilliland's house.

Q. Was anybody else present? A. My husband and I.

Q. Is that the same on both occasions? A. Yes.

Q. Did Mr. Gilliland ever make any statement to you concerning his sexual inclinations with women? A. He just said that he—

Q. Yes or no, please. A. Yes.

Q. When was this? A. One time when my husband and him was discussing women and being with women, and things.

Q. And what period, about what month would you say? A. Well, it was—well, it was the same time I was living there, from July—or, during July and August, when I was there.

Q. Where did this conversation take place? A. Mr. Gilliland's home.

Q. And who else was present, if anybody? A. My husband and myself and Mr. Gilliland.

Q. All right. What did Mr. Gilliland say? A. He said he would not have anything to do with any women, play around with them or travel with them unless they come through the way he wanted them to.

Q. Now, did you—

Mr. Hughes: Your Honor, I am going to move that that be stricken unless he establishes a substantial foundation as to who was present, the time, date and place.

The Court: You may cross-examine on it or re-examine on it. The motion is denied." [Tr. pp. 220-221.]

Testimony of Frank Teich, Manager of the Hilton Hotel, Fort Worth, Texas:

The deposition of Mr. Teich [Pltf. Ex. 12] was, in substance:

That during May or June 1955, there was no registration for Ray Gilliland, Faye Lyons or Clyde Williams at the Hilton Hotel.

It may be fairly assumed that they registered under fictitious names.

Testimony of Raymond Silverman, Co-Owner of the Paradise Valley Guest Ranch:

The deposition of Raymond Silverman [Pltf. Ex. 10] was, in substance:

> That there was no registration for Ray Gilliland or Fay Lyons at the Paradise Valley Guest Ranch.

Defendant submits that the great preponderance of the evidence supports only one conclusion, namely: that plaintiff and Ray Gilliland did commit adultery.

C. The Evidence of Truth of the Alleged Misconduct of Plaintiff and Ray Gilliland Was Admissible on the first and third Causes of Action, to Which Causes of Action Truth Was Pleaded as an Affirmative Defense.

1. Truth was pleaded as an affirmative defense to the first cause of action [alleged oral slanders] and to the third cause of action [allegedly causing publication of an article in the Riverside Daily Enterprise on March 23, 1956]. See Plaintiff's Exhibit 2—Pre-Trial Conference Order. [Tr. pp. 32-46.] Thus, the foregoing evidence of truth of the charges of adultery, referred to in Paragraphs A and B of specification II above, were clearly admissible under the said first and third causes of action.

The act of adultery, like any other fact, may be established by circumstantial proof. *Indeed, that is the usual way in which it is proven.*

Evans v. Evans, 41 Cal. 103;

Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035;

Wilson v. Wilson, 124 Cal. App. 655, 13 P. 2d 376.

Notwithstanding the denials of the parties, evidence of sexual inclination and reasonable opportunity is almost invariably accepted by the courts as sufficient proof of adultery.

Schaub v. Schaub, 71 Cal. App. 2d 467, 162 P. 2d 966.

2. With the agreement of the parties, the two cases, *Lyons v. Gilliland,* No. 20301-WM [on appeal herein] and *Meyers v. Gilliland,* No. 20302-WM [not on appeal] were tried together under Rule 42 and all evidence received in either case, which was applicable to both cases, was to be considered.

At the very outset of the trial, the following took place:

"The Court: I have been over the pretrial conference orders. I assume the originals have been signed. Have they?

Mr. Murphey: That is my information, your Honor.

The Court: I assume that Judge Hall signed them. I haven't seen the originals. I was only looking over the copies in my own file.

Are they signed, Mr. Clerk?

The Clerk: Yes, your Honor, they were signed on May 12th.

The Court: Your may proceed then, Mr. Hughes.

The clerk has handed me a stipulation as to certain facts in the Lyons case, Case No. 20301, signed by the parties.

Have any exhibits been marked?

Mr. Hughes: Just those attached to the pretrial order that are stated in the pretrial order, your Honor.

The Court: I don't believe they are stated to be marked. They are listed. Have any of them been marked by the clerk?

Mr. Hughes: No sir, they have not.

The Court: Do you wish to offer the stipulation in the Lyons case?

Mr. Hughes: I do.

Mr. Murphey: No objection.

The Court: Received in evidence. The clerk can file it and mark it Exhibit 1 in evidence." [The exhibit referred to was marked Pltf. Ex. 1 and received in evidence in Case No. 20301-WM.] [Tr. pp. 83-84.]

D. The Receipt and Consideration of the Evidence of Truth Was, if Error, Harmless. The District Court Was Not Required as a Matter of Law to Find and Did Not Find, on the Issue of Truth.

In plaintiff's motion for new trial, under Paragraph III-F, she specified as a ground that the court failed to find on the truth or falsity of the alleged libelous statements set forth in the cross-complaint for divorce. Under Paragraph I of her motion for new trial, plaintiff specified the elimination by the court of the truth or falsity

of the alleged libelous statements from the issues to be tried. Appellant will proceed to demonstrate that such failure to find on this issue was, if error, harmless to the plaintiff as a matter of law.

The written findings of fact and conclusions of law provide, in material part, as follows:

> "VI. It is true that in said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce; that by her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery; that said cross-complaint was verified by defendant; that the allegations of said cross-complaint, complained of by plaintiff here, were material and relevant to the issues in said action.
>
> VII. It is true that the aforesaid allegations were made by the defendant in good faith and without malice; that, at the time said allegations were made, the defendant did have good and sufficient reason to believe, and honestly and reasonably believed that said allegations were true and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations; that the defendant did not publish said alleged libelous statements other than by filing the said cross-complaint in said divorce action; that said acts of defendant were privileged under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California.
>
> VIII. It is not true that the plaintiff was damaged by said publication in said action No. 62839 in

the sum of $500,000.00 or any other sum or sums as compensatory damages, or in the sum of $500,000.00 or any other sum or sums as punitive damages.

IX. No specific defense of truth having been raised by the answer to the second cause of action, and no such issue having been set forth in the pre-trial conference order, Plaintiff's Exhibit 3 herein, the Court makes no finding of fact as to the truth of the allegations of the said cross-complaint in said action No. 62839." [Tr. pp. 50-51.]

"Conclusions of Law.

II. That the filing of said cross-complaint in action No. 62839 is a privileged publication under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California, and that by reason thereof defendant is not liable to plaintiff for said publication and that plaintiff take nothing by her second cause of action." [Tr. pp. 52-53.]

The defendant did not affirmatively plead as a special defense the truth of the allegations of said cross-complaint in Riverside Superior Court action No. 62839. *Truth,* as a defense to an action for libel or slander, *must* be affirmatively pleaded.

2 *Witkin,* Cal. Proc., Sec. 540;

30 Cal. Jur. 2d, Libel and Slander, Page 145, Page 769;

Davis v. Hearst, 160 Cal. 143, 187-194, 116 Pac. 530;

Stevens v. Snow, 191 Cal. 58, 64, 214 Pac. 968.

Thus, truth of the allegations of adultery was not put in issue by the pleadings under the plaintiff's second cause of action.

In addition, neither the plaintiff nor the defendant considered that truth or falsity or the allegations of the cross-complaint were in issue under plaintiff's second cause of action, at the time of the pre-trial conference order. Counsel for both parties agreed to the form of the pre-trial conference order and, in fact, the pre-trial conference order was offered in evidence by plaintiff and received as Plaintiff's Exhibit 2. [Tr. p. 90.] No issue of truth or falsity of the allegations of the cross-complaint for divorce charging plaintiff herein with adultery was stated in the pre-trial conference order. In fact, the pre-trial conference order [Pltf. Ex. 2] clearly states, in Paragraph V thereof:

"The following issues of fact, and no others, remain to be litigated upon the trial:

* * * * * * * * *

B. Second Cause of Action:

1. Were the allegations of the cross-complaint, filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged under the Provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, which involves the following issues of fact:

(a) Were the said allegations, made by the defendant, made in good faith and without malice.

(b) At the time said allegations were made, did the defendant have good and sufficient reason to believe, and honestly and reasonably believe, that said allegations were true, and did defendant have reasonable probable cause for believing the truth of said allegations.

(c) Did the defendant publish said alleged libelous statement other than by filing the cross-complaint in said divorce action.

2. If the said allegations of said cross-complaint in said action No. 62839 were not privileged, was the plaintiff damaged thereby and the extent of such damage." [Tr. pp. 41-43.]

Plaintiff thus has waived this issue and is precluded from asserting it.

Fed. Rules of Civ. Proc., Rule 16;

Fernandez v. United Fruit Co., 200 F. 2d 414 (1952);

McCarthy v. Lerner Stores Corp., 9 F. R. D. 31 (1949).

E. Assuming Argumentum That the Issue of Truth Was Properly Raised by the Parties, the Court Was Not Required to Find on This Issue as a Matter of Law.

To be a libel, the writing must be *both* false and unprivileged. *Civil Code of Calif.,* Sec. 45. Privilege is a complete defense and, if established, the truth or falsity is immaterial. Truth and privilege are separate and distinct defenses. The court can find and determine that the publication was privileged without making any finding as to truth or falsity of the publication.

Snively v. Record Pub. Co., 185 Cal. 565, 574, 198 Pac. 1 [note 5, involving privilege under subsec. (3) of Sec. 47 of the Cal. Civil Code];

Freeman v. Mills, 97 Cal. App. 2d 161, 217 P. 2d 687, involving privilege under subsec. (3) of Sec. 47 of the Cal. Civil Code.

In the *Snively* case, the California Supreme Court stated on page 574:

"(5) Since a libel is 'a false and unprivileged publication' (section 45), it follows that the publication

must be both false and unprivileged in order that it shall constitute an actionable libel. The allegation and proof that it is true in the sense intended constitute one defense. Allegations and proof that it was privileged upon any of the grounds set forth in section 47 also constitute a defense. The defense of privilege under subdivision 3 of section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, since the proof that it was true would be a complete defense without proof of any other facts and without proving the absence of actual malice."

In the *Freeman* case, *supra,* which involved an appeal by plaintiff from a judgment of nonsuit in an action to recover damages for libel, the court said at page 165:

> "A publication must be false *and* unprivileged in order that it shall constitute a libel [*Snively v. Record Publishing Co.,* 185 Cal. 565, 574 (198 P. 1). The court below, for the purpose of the motion for judgment of nonsuit was required to, and we must treat the publication as false. . . ."

Thus the defense of privilege does not depend at all on the truth of the defamatory charge and to hold, as

contended for by plaintiff, that a new trial should have been granted because the trial court refused to make a finding on truth or falsity, would render the defense of privilege useless. The publication may be privileged though untrue. If true, there is no need of the privilege because truth is a complete defense. To require a finding on truth or falsity when truth or falsity was not an issue, and where the finding could not possibly change the result, would be to require the trial court to make not only an improper but a useless finding.

Appellant submits the trial court did not err in refusing to determine the issue of truth or falsity, or to find upon same. The only grounds of plaintiff's motion for new trial remaining to be considered relate to Findings VII and VIII.

III.

If the District Court Granted the Motion on the Ground of Insufficiency of Evidence to Support the Finding of Privilege [Finding VII] the Decision Was a Gross Abuse of Discretion as There Was Ample Evidence to Support the Said Finding as a Matter of Law.

The cross-complaint containing the alleged libelous allegations, having been filed in the Superior Court of Riverside County, California, the California law applies. The substantive law of the state where the defamation takes place is applicable under the Rules of Decision Act.

Rules of Decision Act, 28 U. S. C. A. 1652;
30 Cal. Jur. 2d 684, Libel and Slander;
Gang v. Hughes, 111 Fed. Supp. 27.

The California Civil Code, Section 47, in its material part, reads as follows:

> "A privileged publication . . . is one made in any . . . (2) judicial proceeding . . .; providing that an allegation . . . contained in any pleading filed in an action for divorce . . . made of or concerning a person by or against whom no affirmative relief is prayed in such action, shall not be a privileged publication . . . as to the person making said allegation . . . within the meaning of this section unless such pleading be verified and made without malice by one having reasonable and probable cause for believing the truth of such allegation . . . and unless such allegation . . . be material and relevant to the issues in such action."

The parties hereto have admitted that the cross-complaint for divorce was verified by defendant and that the allegations were material and relevant to the issues of said action No. 62839 [See Pltf. Ex. 2, Pre-Trial Conference Order], leaving only the following issues of fact: (1) Were the allegations made by defendant *without malice;* and (2) did plaintiff have reasonable and probable cause for believing the truth of such allegations.

A. The Evidence Conclusively Shows There Was no Malice.

It is clear that the malice referred to in Section 47 of the Civil Code is actual malice, or malice in fact.

Davis v. Hearst, supra;

Snively v. Record Pub. Co., supra.

In the *Snively* case, the California Supreme Court stated at page 576:

"(8) The word 'malice' in the provisions of the Civil Code upon the subject of libel and slander means actual or express malice, as distinguished from that somewhat fictional form of malice sometimes described as 'a wrongful act done intentionally without just cause or excuse' or as 'the absence of legal excuse.' This was decided upon a very elaborate discussion of the subject in *Davis v. Hearst,* 160 Cal. 155 to 168 (116 Pac. 530). The court there held that 'A full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice.' The court was careful to say that it was here speaking of expressed malice or actual malice, and not of the fictional malice referred to which in some jurisdictions, but not in this state, is held to be a necessary ingredient of libel. With regard to actual or express malice, it was decided that it was material only where the plaintiff alleged it in the complaint as the foundation of a claim for punitive damages, or where the defendant in his answer alleged the absence of such malice as one of the necessary contentions of the defense that it was a privileged communication under one or more of the three varieties of qualified privilege described in subdivisions 3, 4 or 5 of section 47 of the Civil Code. Actual malice was there defined "as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person," and " . . . the motive and willingness to vex, harass, annoy or injure." It was said that such actual malice could be established 'either by direct proof of the state of mind

> of the person, or by indirect evidence so satisfying to the jury that they may from it infer and find the existence of this malice in fact'; that the evidence 'may be direct . . ., going to declarations, acts and conduct of defendant, showing personal ill will toward the plaintiff, but it will more usually be indirect or inferred . . ., and to this end of proving malice inferentially all legitimate evidence is admissible bearing on the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice, but from which the existence may be logically inferred, herein including the circumstances, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights'."

In the instant case, there is no evidence at all that defendant, in making the allegations of her cross-complaint for divorce, was motivated by "hatred or ill will evidencing a willingness to vex, annoy or injure" the plaintiffs.

1. Direct proof of defendant's state of mind: The only direct proof of defendant's state of mind was produced by defendant herself. *This evidence is uncontradicted.* It is well established that, where relevant, intent or motive may be proved by the testimony of the party himself as to his own intent or motive. Thus, in an action for malicious prosecution, a party may testify that he acted in good faith, without malice, believing the plaintiff guilty.

> *Schubkegel v. Gordino,* 56 Cal. App. 2d 667, 674, 133 P. 2d 475.

See also:

Fleet v. Tichenor, 156 Cal. 343, 104 Pac. 458, involving an action for slander and testimony of a party allowed as to absence of malice.

The uncontradicted testimony of defendant here is as follows:

"Q. [By Mr. Murphey]: Well, the time that you verified this cross-complaint, Mrs. Gilliland, did you bear Ann Meyers or Faye Lyons any ill will? A. No, I did not.

Q. Did you have any feeling of spite against either of them? A. No.

Q. Did you in your mind bear any vindictive enmity towards either of them? A. No.

Q. In filing this cross-complaint were you actuated by any wish or desire or design or purpose to injure Ann Meyers or Faye Lyons? A. No.

Q. Did you honestly believe the truth of the allegations of that cross-complaint? A. Yes." [Tr. pp. 239-240.]

Defendant also testified that she did not even know plaintiff at the time of filing her cross-complaint for divorce.

Thus, there is no direct evidence going to declaration, acts or conduct of the defendant here, showing personal malice could reasonably or logically be inferred.

2. Indirect evidence of defendant's state of mind: There is no indirect evidence from which the existence of ill will towards the plaintiff.

B. Plaintiff Had Reasonable and Probable Cause for Believing the Truth of the Allegations of Her Cross-complaint.

The following is a summary of the evidence within defendant's knowledge at the time of filing her cross-complaint:

1. Defendant testified in substance:

That Ray Gilliland told her before her marriage that he had been intimate with two women in Florida [Tr. pp. 97-98.] James Roche informed her in July, 1954, that Ray Gilliland had been intimate with two women named Virginia Brown, Marilyn Lee at Lake Tahoe in July, 1954; that Ray Gilliland stopped to see them at their home, went into their bedrooms with them and later came out, and that he gave them money. [Tr. pp. 232-234.]

She had information from others than Blanche Lampert and Mr. Gilliland that Faye Lyons would visit in his home in years previous to her marriage to Mr. Gilliland; that Faye Lyons was a guest of his in Oregon at his cabin up there. [Tr. p. 100.]

On January 2, 1955, she, Wm. L. Murphey and Mr. Maxwell Dorn went into Ray Gilliland's hide-away [home] at Scottsdale; that there was lipstick on a cup of partially consumed coffee, lipstick on a lighted cigarette; that Wm. L. Murphey told her he had seen a woman's face at the bedroom curtains as they approached the house; that she tried the bedroom door and it was locked from the inside; that she told Ray Gilliland "There is a woman in this house," and that Ray Gilliland replied "So what." [Tr. pp. 234-235.]

That people in the neighborhood told her there were women at Ray Gilliland's house all the time. That defendant, before verifying her cross-complaint, saw a photostatic copy of the registration of Ray Gilliland at the Colonial House, Las Vegas, Nevada, "Ray Gilliland and family." [Deft. Ex. E.]

That she had a conversation with Wm. L. Murphey, her attorney, on the subject-matter of the cross-complaint charging adultery. That, at the time of filing the cross-complaint, defendant did not know plaintiff. [Tr. p. 114.]

That she was present when Blanche Lampert's sworn statement was taken on November 2, 1955. [Pltf. Ex. 5, Tr. p. 96.]

2. Summary of Blanche Lampert's Statement, Plaintiff's Exhibit 5, made in the presence of Defendant:

In May 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked a steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch, when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock in the morning at Ray Gilliland's house. They would sit there and drink together. Later, Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland's house every day and I baby-sat with

the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June, when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge; I think he bought it from Ed Spears.

At the trial, Blanche Lampert testified, in substance:

I told Mr. Murphey Faye Lyons and Ray Gilliland were going to Las Vegas. [Tr. pp. 215-216.]

Appellant submits that Finding VII was supported by a preponderance of the evidence: that Mrs. Gilliland knew of Ray Gilliland's sexual inclination and propensity toward other women; that Ray Gilliland and Faye Lyons had opportunity to commit adultery; that the defendant honestly and reasonably believed, in good faith, that Ray Gilliland had committed adultery with the plaintiff; that she had reasonable and probable cause for believing the truth of said allegations; and that she acted without malice toward the plaintiff in filing her said cross-complaint.

3. The trial court having properly found that the allegations of the cross-complaint were privileged, the trial court did not err in finding that plaintiff had not been damaged by the filing of said cross-complaint.

This is the last point [III-F] raised by plaintiff in her motion for new trial.

If the libelous statements were privileged, as found, no legal damage can result.

Faye Lyons, on cross-examination, testified, in substance:

Mr. Gilliland drove me from Fort Worth to Miami, stopping at hotels and motels; that Ray Gil-

liland registered and paid all the bills and for meals; that it was of no importance to her whether the rooms were adjoining or not. [Tr. pp. 197-198.]

Counsel for plaintiff admitted at the trial that any damage which plaintiff may have suffered was caused, to a considerable extent, by her own conduct. The following occurred at the conclusion of the evidence:

"The Court: What do you say to any consideration, if we reach that question, being given to the fact as to the second cause of action that plaintiffs may have brought some of the damage on themselves?

Mr. Hughes: In the second cause of action?

The Court: Yes. By giving the appearance that certain things were so, even though they were not?

Mr. Hughes: Well, your Honor, on that basis I call your attention to when a publication is not privileged, if the publisher had no probable cause for believing the truth of his statement or did not investigate the truth of the statement, he is liable.

The Court: Well, if a wife saw her husband traveling around with another woman, staying all night in hotels with him; if she made a technical error should she be penalized the same as if she made a substantial error?

In other words, what I am getting at is this: Assuming the same damage to reputation, would you seek this same award in a situation where the woman wasn't even at the hotel. And another case where the woman says, 'Yes, I was in the adjoining room with him, but nothing happened. Why? Because nothing could happen.'

Would you award the same damages?

Mr. Hughes: The same amount?

The Court: Yes. They are both equally damaged in their reputation.

Mr. Hughes: I don't think I would, your Honor.

The Court: Well, that is what I am getting at. How much consideration should be given to the fact where a woman knowingly runs around with a married man, who is having divorce troubles with his wife, how much of that damage should be said to be brought upon herself.

Mr. Hughes: I am afraid quite a bit, your Honor.

The Court: It's a little bit like contributory negligence, isn't it?

Mr. Hughes: Well, is contributory negligence a defense?

The Court: No. I didn't mean the precise analogy. I meant like a person hurting himself. A woman who knows that a man is married, knows that litigation is going on between them, shouldn't it be said that she brought some of the damage on herself?

Mr. Hughes: I would say the measure of damage, the value of same, would be greatly reduced."

It is obvious that plaintiff violated the proprieties and had no regard for the results of her improprieties. Also, plaintiff's counsel admitted that any damage plaintiff might have suffered by the alleged libelous statement were greatly reduced by plaintiff's conduct.

F. Conclusion.

Appellant submits: (1) the District Court had no urisdiction to grant the motion for new trial on the round specified; (2) if it did have jurisdiction to grant aid motion on the ground stated, it was a gross and rejudicial abuse of discretion; and (3) if the court ranted the motion on the ground of insufficiency of evi- ence to support the finding of privilege [Finding VII], was a gross abuse of discretion as there was a great reponderance of evidence to support the finding as a natter of law.

Therefore, the order granting the motion for new trial nust be reversed and the judgment reinstated.

Respectfully submitted,

Wm. L. Murphey and
John B. Anson,
By Wm. L. Murphey,
Counsel for Appellant.

N. B. All emphasis is ours.

APPENDIX OF EXHIBITS

Pltf's Ex. No.	Deft's Ex. No.	Identification	Offered at Tr. Page	Received at Tr. Page
1		Stipulation of Facts	84	84
2		Pre-Trial Conference Order	90	90
3		Cross-Complaint for divorce, Action #62839	90	92
4		Page of Riverside Enterprise newspaper	108	108
5		Sworn statement of Blanche Lampert	212	212
6		Pages 41-43 of deposition of Elsinore Machris Gilliland	171	171
7		Complaint for annulment in Riverside action	174	175
8		Motel receipts	207	208
9		Conditional sales contract for Dodge automobile	209	209
10		Deposition of Ray Silverman	228	229
11		Deposition of Lenore Silverman	228	229
12		Deposition of Frank W. Teich	229	229
13		Deposition of Mary Elizabeth Bailey	230	230
	A	Deposition of Ida Mae Barr	165	165
	B	Deposition of Faye Lyons	206	206
	C	Stipulated testimony of Clyde Williams	210	210
	E	Registration at Colonial House	240	240